**In re Estate of the Late Simon Douglas Kibaara Mutegi (Deceased) (Succession Cause 88 of 2001) [2024] KEHC 14253 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14253 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**SUCCESSION CAUSE 88 OF 2001**

**SM MOHOCHI, J**

**NOVEMBER 14, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE SIMON DOUGLAS KIBAARA MUTEGI (DECEASED)**

## RULING

1. Before this Court are two Applications for the Court's determination. The First Application by the 2nd Administrator Loyford Maingi Mutegi dated 26th June, 2024 seeks that the law firm of Wilber Sherwin Advocates be disqualified from participating in or representing any party in the proceedings of this cause forthwith and costs of the application to be in the cause.

### Applicant's Case

2. The Application is premised on the grounds that he has not waived the advocate client privilege and he conduct of the advocates was in breach of the Law Society of Kenya (LSK) Code of Standards of Professional Practice and Ethical Conduct (2017)

3. The Application is supported by the Affidavits of Loyford Maingi Mutegi and Rosalid Gatwiri Maingi. It was the Applicant's case that sometime in the year 2020 the Applicant together with his daughter Rosalid Gatwiri Maingi visited the offices of the said advocates. The purpose of the visit as they were informed by Advocate Njoroge was to discuss with Peter Njuguna Kebaara who claimed to be the only child of the deceased, about the distribution of the assets of the deceased.

4. The Applicant advised them that, the deceased had said that should anything happen to him Peter Njuguna Kebaara should be allocated 5 acres from property Olongai Settlement Scheme/33. That he was assured by advocate Njoroge that nothing would be decided on the first visit but subsequently found out that the said advocates were representing both him and Peter Njuguna Kebaara.

5. That again together with his daughter, they visited the office of the said advocate where advocate Njoroge said that the Court had ordered a DNA test to be carried out on him and Peter Njuguna Kebaara in order to conclude the case amicably. That he did not understand the meaning of DNA test or its implications but followed the advice and had tissue samples taken from his body.

6. He averred that he later came to learn that the Court had not made any order for a DNA test to be carried and that the DNA test was carried to aid Peter's interests to be declared the only heir of the deceased.

7. He further avers that, he objects to being cross-examined by the said advocates who deliberately misled him and the communication, information and tissues obtained were carried in a confidential relationship and it would be an injustice and breach of trust if Advocate Njoroge is allowed to use the information against him.

8. He also contended that, the advocate has not sought his consent and has insisted that he will use the information without him lifting his privilege which he feels will he will be prejudiced.

**Respondent's Case**

9. In opposing the Application, Jane Njoki Njuge, the 1st Administrator, vide Replying Affidavit sworn on 24th July, 2024, deposed that that the application has not met the legal threshold to warrant any interference try this Court on her legal representation. That the right to legal representation of her own choice is a Constitutional right which can only be interfered with in the clearest of cases where the Court is satisfied that continued representation will result in miscarriage of justice.

10. It was deposed further that the Applicant has failed to demonstrate any real prejudice or real mischief that he will suffer by her advocates continued presence in this matter. It was her case that her late husband Peter Njuguna Kebaara, retained her advocates on record on 1st April 2014 to act for him in this matter and had been representing her for over 10 years and it would be prejudicial, to her case if they are disqualified from so acting on flimsy grounds.

11. She argued that it was the Applicant who sought to be represented by the advocates who by then had been representing her late husband. That Peter Njuguna Kebaara was in control of the case before his demise on 2nd October, 2021 and upon family discussions it was deemed fit that the current advocates continue acting for her in the matter as he had intimate knowledge of the case for more than seven years. The advocates had filed a notice of change of advocates on 14th November, 2019.

12. That pursuant to the Applicants instructions the said advocates filed an Affidavit sworn on 5th November, 2019 and Further Witness Statement dated 30th September, 2021 which are at cross purpose as they contradict the evidence by the Applicant. The documents form part of the record and there is no possibility that the said advocates could be called to testify in Court regarding them.

13. That the advocates only had two meetings with the Applicant and his daughter whereas the advocate started acting for them long before he acted for him hence she would be highly prejudiced if the said advocates are disqualified. That the case involves other parties besides the Applicant and herself therefore it would be unfair to disqualify him based on alleged prejudice not adequately demonstrated.

14. That at the time the Applicant and his daughter visited the advocates office, the Applicant was being represented by Kimata & Co Advocates and the said advocates could not have summoned them.

15. She argued that the issue was an afterthought since although the Applicant said that he was advised that the Court had ordered a DNA test, during cross examination, he never stated that he was told that the same had been ordered by the Court. That his advocates never questioned Angus A. Nassir who produced the DNA Test Report on any alleged Court Order and further the Applicant never indicated that he was objecting to production of the DNA report before commencement of hearing

16. She contended that, the Applicant does not state what action he took after finding out that the Court did not order for any DNA test to be carried out. He ought to have applied for the advocates disqualification the minute the report was presented in Court.

17. She averred that, that it is incumbent upon a party wishing to disqualify an advocate from acting for another party to show that it will suffer prejudice if such an advocate continues to so act for that party. That mere suspicion or apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party. The Application has come late in the day to derail the hearing of the matter

**Applicant's Submissions**

18. Through submissions filed on 14th August, 2024 the Applicant submitted that the firms of Wilbur Sherwin Advocates represented the Applicant for quite some time therefore their communication and information is privileged.

19. Further that consent to lift the privilege has not been given as anchored under Section 134(1) and (2) of the *Evidence Act*. Reliance was placed in Century Oil Trading Company Limited vs Kenya Shell Limited [2008] eKLR in seeking disqualification of Advocate Mr. Sherwin Njoroge. That privilege protects the client not the advocate. The firm filed the pleadings which he was cross examining the Applicant on and the information given may be used to the detriment of the Applicant.

20. It was further submitted that there was conflict of interest as defined under Paragraph 93 of the Law Society of Kenya Code of Conduct and Ethic (2017 version). That it would be justifiable to curtail Jane Njoki's right to represented by Mr. Njoroge and his firm. He places reliance in The Delphis Bank Limited vs Channan Sigh Chatter & Others [2005] eKLR to submit that there is a likelihood of miscarriage of justice occasioned to the Applicant if the Mr. Njoroge and his Firm are not disqualified.

**Submissions by the 1st Administrator**

21. It was submitted that that the DNA Test Report having already been produced by the maker, it was not clear which communication, information or issues the Applicant is afraid the advocate would prejudice him on.

22. It was her contention that the DNA Test Report now forms part of the evidence that and the Applicant has not demonstrated how being questioned on the contents thereof would be prejudicial. Reliance was placed in Murgor & Murgor Advocates v Kenya Pipeline Co. Ltd [2021] eKLR, to submit that it is not enough for the Applicant to just say that the Advocate is in possession of some information that may be used against him but it is incumbent upon the Applicant to provide some particularity as to the nature of the information that he is afraid will be disclosed.

23. Counsel submitted that the right of party to representation of choice is a constitutionally protected right that cannot be derogated on non-existent facts or issues and can only be interfered with where there is a conflict of interest that may compromise confidentiality in an advocate/client relationship, which conflict must be demonstrated by sufficient evidence. Reliance was placed in David M Mereka t/a Mereka & Co Advocates v County Government of Nairobi [2021] eKLR, and Jopa Vilas LLC v Overseas Private Investment Corp & 2 Others [2014J eKLR.

24. It was argued further that where a party asserts that prejudice or conflict of interest exists, he must provide sufficient evidence to demonstrate that such a conflict of interest indeed exists.

25. While relying on the decision in British-American Investments Company (K) Limited v Njomaitha Investments Limited & another [2014] eKLR and Delphis Bank Ltd v Channan Singh Chatthe & 6 Others [2005] eKLR it was submitted that the Applicant has failed to provide evidence to demonstrate the existence of a conflict of interest and further he has not shown any real mischief or real prejudice he will suffer if the firm of Wilbur Sherwin continues to act for the 1st Administrator.

26. Counsel questioned what information or communication can the advocates disclose from a DNA Test Report that has already been filed in Court and produced by the maker or from the affidavit and statement that have also been filed in Court?

**Submissions by the 3rd Administrator.**

27. The 3rd Administrator submitted that, he does not oppose the Application and further submitted that, the Applicant and the 1st Administrator were being represented by the same advocate at the time of filing witness statement dated 30th September, 2021 and affidavit sworn on 5th November, 2019 therefore there existed an advocate client relationship.

28. It was argued that at the time of preparing the said documents the advocate was privy to confidential information shared by the Applicant. That any form of cross-examination that will be done by the said advocates will disclose privileged information prohibited under section 134 of the *Evidence Act* and the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct.

29. Reliance was placed in King Woolen Mills Ltd Vs Another vs Kaplan and Straton Advocates (1990-1994) EA 244 where the Court held that "an advocate who has acted for two common clients cannot act for either party in litigation when a dispute arises between the common clients concerning the original transactions or the subject matter for which he acted for the clients as a common advocate."

30. It was submitted that the continues participation of the firm of Wilbur Sherwin Advocates in these proceedings amounts to conflict of interest.

31. The Second Application by Jane Njoki Njunge dated 3rd July, 2024 seeks that, the Further Witness Statement by Franklin Mutembei Mutunga dated 19th June, 2024 and the 3rd Administrators List of documents and documents filed and dated 19th June, 2024 be struck out.

**Applicant's Case**

32. It was her case that, the 3rd Administrator filed a Further Witness Statement and list of documents on 19th June, 2024 and one of the documents filed is a report dated 12th June, 2024 by Forensic Science Consultant. The report disputes the finding of the DNA Report filed by the Administrator which has already been produced in Court by the maker.

33. It was her argument that, the documents came too late in the day because the maker of the DNA Report has already testified and produced the report and as such he will not have an opportunity to rebut challenge the report by Forensic Science Consultant. That is the documents is produced her case will be prejudiced, unfair and contrary to the principles of natural justice.

34. It was her case further that the DNA report was filed and served in September of 2021 and if the administrator had any intention of challenging the same they had enough time to before commencement of the 1st Administrators' Case. That there is a 3-year period between the 3rd Administrator's advocates letter dated 6th June, 2024 and the time he was filed the DNA report.

35. She contended that the same amounts to trial by ambush as the 3rd Administrator never gave an indication to Court that he would be filing another Report challenging the DNA report and chose to rush to Court after the maker of the DNA report had produced it and cross examined.

**Respondent's Case**

36. The 3rd Administrator, Frankline Mutegi Mutunga opposed the Application by way of Relying Affidavit sworn on 15th July, 2024. He states that in his Further Witness Statement he is making a clarification to the effect that he does not know Jane Njoki Njunge who claims to be the widow of Peter Njuguna Kibaara. That the said Jane Njoki Njunge has not testified in this cause and she shall have an opportunity to respond to any issue in his further statement.

37. He added that he has also sought expert opinion on the DNA report that was produced in this Court as he cannot interpret the said DNA report which was not done by consent or by a Court Order. He argues that the opinion shall not prejudice the Applicant in any way as the expert who produced the DNA report can still be recalled for any clarification as the Applicant is yet to close her case.

38. It was his case further that he was ready and willing to meet any additional costs of recalling the said expert if there would be such need. He argued further that there is a controversy on how the said DNA report was prepared and it is in the interest of justice that the Court receives alternative view on the issue from another professional.

39. That the Applicant does not want the DNA report to be challenged in these proceedings and yet it was prepared under controversial circumstances. It would be unjust and unfair to strike out that crucial piece of evidence already filed in Court when any prejudice occasioned to the Applicant can be redressed by recalling the maker of the DNA report, if need be, at the 3rd administrator's expense.

**Applicant's Submissions**

40. It was submitted in the Submissions dated 9th October, 2024 that the 3rd Administrator has been in possession of the said report for more than three years and the actions of the 3rd Administrator in waiting for the DNA Test Report to be produced and then smirks of ill will, malice and is aimed at stealing a march from the 1st Administrator by trying the case by ambush.

41. Alois Oceano D'sumba v Rajnikant Narshi Shah & another [2017] eKLR the Court at cited the case P.H. Ogola Onyango t/a PittsConsult Consulting Engineers vs Daniel Githegi g/a Quantalysis [2002] to quote the Court thus:

> " Indeed discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the Court no doubt has jurisdiction to allow a party to introduce a document or documents once the opposing party has closed its case. To allow him to introduce documents after the plaintiff has closed his case will occasion the plaintiff serious prejudice that cannot be cured by cross-examination. In Civil litigation there must be a level playing field. {hat field cannot be level were one party permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed."

42. Reliance was also place in Neeraj Jayatilaiya Kalaiya v Cheruiyot & 5 others [2022] KEELC 2669 to submit that the documents were filed without leave of Court. Directions had already been given and it was argued that by filing his documents so late in the day only points to a litigant who is hellbent on delaying the just and speedy resolution of this matter.

**3rd Administrator's Submissions**

43. In the submissions dated 9th September, 2024, it was submitted that that striking out pleadings is a draconian and the power to strike out a pleading should be exercised judiciously as was expounded in Blue Shield Insurance Company Ltd vs Joseph Mboya Oguttu [2009] eKLR and Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd & Others (No. 53) (1970) ChpD 506.

44. It was further submitted that there will be no prejudice occasion to the Applicant or any party if the documents are adopted. That the 3rd Administrator recorded his statement on 24th May, 2021 when the person they were litigating with Peter Njuguna and as such the statement is only meant to clarify his knowledge of Jane Njoki. Further that there is nothing that is in the statement that cannot be addressed during cross-examination. The Applicant will have her day in Court.

45. On the issue of the DNA report, he submitted that the only way to rebut that the same was not sanctioned by any party is to seek the opinion of a second forensic expert. That the Applicant has the right to recall her witness to testify on the opinion of the expert witness as she had not closed her case.

46. It was argued nevertheless that the opinion of an expert is not binding and only helps to aid the Court and relied on the decision in Stepehen Kanini Wang'ondu v The Ark Limited [2016] eKLR where the Court held that expert evidence does not trump all evidence it must be given appropriate weight.

**2nd Administrator's Submissions**

47. The 2nd Administrator in the submissions filed on 14th August 2024 submitted that, the Applicant stands to suffer no prejudice if the Report regarding the DNA test done is admitted in evidence. That the Court has discretion to order the recall of a witness as provided for under Section 146 (4) of the *Evidence Act* and Order 18 Rule 10 of the Civil Procedure Rules.

48. It was further submitted that the Applicant has not stated how she would be prejudiced and if on costs, the 3rd Administrator has offered to cover the same.

49. It was also submitted that there appear significant gaps in the DNA report that needs clarification and the Court can resort to Article 159(2) (d) of *the Constitution* to ensure justice is administered without undue regard to procedural technicalities. Reliance was placed in Aniket Property & Investment Limited vs Hamadi Juma Mwakibibo & Others [2018] eKLR to submit that while procedure is central in the dispensation of justice its nots its mistress but the hand maiden and can safely be dispensed with to further the interests of justice.

**Analysis and Determination**

50. The two (2) Issues crystalizing before Court is;

    i. whether a conflict of interest exist warranting disqualification of an advocate?

    ii. Whether Documents filed after close of pleadings without the leave of the Court should be struck-out?

51. Succession proceedings are not adversarial; they are more of inquisitorial. But as would emerge the intensity of adversity manifesting is a complete opposite as to what would be expected of the parties.

52. This Court equally abhors weaponization of litigation contrary to the constitutional predicates on the dispensation of delegated judicial authority.

53. In this instance it is undisputed that between Mr. Sherwin Njoroge Advocate representedLoyford Maingi Mutegi while at the same time while representing the late Peter Njuguna Kebaara whom he had been representing for a longer period.

54. That it was in the course of the Advocate-Client relationship that a disputed DNA examination was conducted of which the Applicant contends he shall be prejudiced if Mr Njoroge was to cross examine him on the subject and further that, in the course of their relationshipthe advocate was privy to confidential information shared by the Applicant and that any form of cross-examination that will be done by the said advocates will disclose privileged information prohibited by law

55. Section 134 of the *Evidence Act* provides for the protection of client-advocate communication as follows:

> " 1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.
>
> Provided that nothing in this section shall protect from disclosure—
>
> (a) any communication made in furtherance of any illegal purpose
>
> (2) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.
>
> SUBPARA (b)
>
> The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.".

56. With regards to conflict of interest, the Court of Appeal in King Woolen Mills Ltd & Another vs. Kaplan and Straton Advocates (1990-1994) EA 244 observed as follows: -

> " An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients concerning the original transaction or the subject matter for which he acted for the clients as a common advocate".

57. The test for disqualification of an Advocate was laid in the Court of Appeal case of Delphis Bank Limited v. Channan Singh Chatthe & 6 Others which followed the decision in Rakusen v Ellis, Munday & Clarke [1912] CH 831 and held that: -

> .... there is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will in all human probability result....
>
> (Emphasis added)

58. I have considered all arguments for and against the disqualification, this Court has systematically considered if the existing relationship gave rise to privileged communication and if the current matter

revolves around the same subject matter of the privileged communication and arrived at the finding that there existed and Advocate-Client relationship and that the original transaction therein relates to this instant matter and furthermore that and examination was conducted that the Applicant contests which was subject to advise by Advocate Njoroge.

59. This Court finds that, there exists conflict of interest of Advocate Sherwin Njoroge and that by dint of the contested nature of the DNA report and the manner in which the same was obtained it will be extremely prejudicial to the Applicant.

60. The Mischief revolves on the breach of trust by the advocate alleged by the Applicant, giving rise to the contested DNA examination and its resultant report.

61. The Applicant's witness statement dated 30th September, 2021 and affidavit sworn on 5th November, 2019 were resultants of the Advocate-Client relationship and form the core documents for the cross-examination.

62. While extensive submissions have been made on the DNA issue the main objector proceedings are ongoing and it would be unwise to wade in at this interlocutory stage.

63. This Court thus finds merit in favor of the Application dated 26th June, 2024.

64. With regards to the 2nd Issue, while this Court focuses on rendering substantive justice, it abhors wanton disregard of procedure or directions of the Court, filing documents and pleadings long after close and in a presumptuous manner filing of documents without the leave of the Court.

65. Franklin Mutembei Mutunga took the witness stand and testified on the 11th June 2024 he was cross examined by Mr. Waiganjo and in the Course of Cross-examination by Mr. Njoroge, the proceedings were disrupted when Mr. Njoroge attempted to cross-examine on the two impugned documents (witness statement dated 30th September, 2021 and affidavit sworn on 5th November, 2019.

66. The Further Witness Statement by Franklin Mutembei Mutunga dated 19th June, 2024 and the List of documents filed and dated 19th June, 2024 were filed without the leave of the Court.

67. Franklin Mutembei Mutunga states that, in his Further Witness Statement he is making a clarification to the effect that he does not know Jane Njoki Njunge who claims to be the widow of Peter Njuguna Kibaara.

68. That, there will be no prejudice occasion to the Applicant or any party if the documents are adopted. That he recorded his statement on 24th May, 2021 when the person they were litigating with Peter Njuguna was alive and as such the statement is only meant to clarify his knowledge of Jane Njoki.

69. The power to strike-out pleadings or proceedings is a draconian one that must be exercised judiciously and with caution. However, a Court of law would not hesitate to strike-out proceedings which are initiated with the intention of abusing the Court process.

70. The Court of Appeal in Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR stated:

> " The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect

covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

> "The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

71. In that judgment, the learned Judge quoted Dankwerts L.J in Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice stated:

> " The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

72. In Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court summarized the principles as follows:

> " The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

73. This Court is of the considered opinion that the 3rd Administrator has not persuaded the Court as to why he never sought for the leave of the Court but rather filed the pleadings in a presumptuous manner.

74. This Court notes that on the 19th June 2024 was on the eve of the hearing of this matter and that a prudent man would view such a filing as one intended to disrupt the hearing, trigger recall of witnesses and generally protract the matter.

75. The party filing further documents had been in possession of the documents for much longer and no justification of delay was made.

76. The Court equally finds that the filings of the 19th June 2024 effectively disrupted the ongoing objector proceedings into interlocutory arguments and was in abuse of the process of Court thus the Court finds that, the same would prejudice fair trial.

77. The 3rd Administrator had all the ample opportunity to file the documents years earlier and before he took the witness stand on the 11th of June 2024.

78. This Court thus finds merit and favor in the Applicationdated 3rd July, 2024 seeks the striking-out of the Further Witness Statement by Franklin Mutembei Mutunga dated 19th June, 2024 and the List of documents and documents filed and dated 19th June, 2024.

**Final Orders**

i. Mr. Sherwin Njoroge Advocate is hereby disqualified formacting on behalf of any party in this matter.

ii. The witness statement and list of further documents all evenly dated 19th June 2024 filed Franklin Mutembei Mutunga are hereby struck-out and expunged from the record.

iii. I shall not award any cost orders on the two Applications this being a family matter.

It is ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 14TH DAY OF NOVEMBER, 2024.**

**.....**

**MOHOCHI S.M**

**JUDGE**